STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

FILED: OCTOBER 26, 2012

JITENDRA PATEL	:	
	:	
v.	:	**C.A. No. KB-2012-0301**
	:	
SHIVAI NEHAL REALTY LLC	:	

DECISION

STERN, J. This Motion to Authorize Payment of Fee was filed by Pinnacle Realty Investments seeking payment of a broker's fee pursuant to the terms of an agreement between Pinnacle Realty and Special Master Vincent Indeglia, Jr. The National Republic Bank of Chicago submitted a limited objection and the motion was heard before this Court on October 2, 2012.

I

Facts and Travel

The case which underlies the motion presently before this Court arises from the insolvency of the real estate holding company Shivai Nehal Realty LLC ("Respondent"). Respondent's primary asset is the Fairfield Inn and Suites Hotel (the "Hotel"), which has ninety rooms and is located in Coventry, Rhode Island. Jitendra Patel ("Petitioner") is the sole member of Respondent and, as such, decided to dissolve the limited liability company to prevent waste

and loss of its remaining assets.[1] For the same reason, Petitioner filed with this Court a Petition for the Appointment of a Receiver on March 20, 2012.[2]

This Court appointed Vincent Indeglia, Jr. as Special Master (the "Special Master") of Respondent. The Special Master's main purpose was to oversee the sale of the Hotel. In furtherance of this purpose, the Special Master entered negotiations with Pinnacle Realty Investments ("Pinnacle") to assist in the sale of the Hotel. These negotiations resulted in an engagement letter with terms providing Pinnacle with a fee equal to the greater of either 3.25% of the sale price or $100,000. Additionally, Pinnacle agreed to bear all marketing costs associated with the sale. This engagement letter was reviewed by the Special Master, Pinnacle, and The National Republic Bank of Chicago (the "Bank"), who is the senior secured creditor with respect to the assets of Respondent, including the Hotel.[3]

The Special Master subsequently filed a Petition to Hire a Professional Broker on April 20, 2012. Included with the Special Master's Petition was the proposed agreement, as embodied by the engagement letter, including terms concerning the deliverables, the extent of the work to be performed, and the contingency fee. On April 27, 2012, the Bank filed a Limited Objection to the Special Master's Petition to Hire a Professional Broker. The Bank's Limited Objection sought to limit Pinnacle's commission in the event that there was a successful stalking horse bid or credit bid at the sale of the Hotel.

---

[1] Petitioner is also a creditor of Respondent with a claim in the amount of $5,191,072.92 as of the date Petitioner filed its petition. See Pet. for Appointment of Receiver ¶ 4.

[2] At the time this Petition was filed, Respondent was facing an imminent foreclosure sale of the Hotel and Petitioner avoided that foreclosure sale by having this Court impose a stay.

[3] As of April 24, 2012, the Bank was owed in excess of $7,218,900.37 with interest accruing at the rate of $621.88 per day and was delinquent as of the payment due on August 12, 2011. See Bank's Limited Obj. to Temp. Special Master's Pet. To Hire Prof. Broker ¶ 6.

As a result of the Bank's Limited Objection, the parties negotiated an agreed order which was entered by this Court on May 31, 2012 (the "Order"). This Order allowed the Special Master to hire Pinnacle; however, the Order also modified the proposed engagement letter by providing for a forty percent (40%) reduction in Pinnacle's fee in the event that Nayna Patel, Naivka Ent, or Bharat Patel successfully closed on the sale of the Hotel as the highest and best bidder. The Order did not address any adjustment in Pinnacle's fee in the event of a successful credit bid by the Bank.[4] In consummation of Pinnacle's engagement by the Special Master, an agreement was entered into pursuant to the agreed upon terms (the "Agreement"). Other than the potential reduction of Pinnacle's fee in the event that Nayna Patel, Naivka Ent, or Bharat Patel successfully closed on the sale, the Agreement provided that Pinnacle would be paid the greater of either 3.25% of the sale price or $100,000, subject to Court approval.

On July 16, 2012, the Bank filed a Limited Objection and Cross-Motion to the Special Master's First Interim Report. This Limited Objection and Cross-Motion sought not only to approve the Bank's secured claim but also to amend the Court's Order by allowing the Bank to credit bid on the Hotel and receive the forty percent (40%) reduction in Pinnacle's fee in the event that such a credit bid was successful. This Court heard arguments from the Bank and the Special Master on the Bank's Cross-Motion on July 26, 2012 and subsequently entered the proposed order on August 1, 2012 (the "Amended Order"). This Amended Order added the following language to the original Order:

> "Furthermore, in the event that the Bank shall credit bid and its credit bid shall be the bid which closes due to the fact that the highest and best bidder should fail to close, then in such event Pinnacle's fees shall be reduced by forty percent (40%) as if Pinnacle had retained a third party as a co-transaction coordinator in the sales process." Order, Aug. 1, 2012.

[4] At the time the Order was entered, the Bank had not filed a motion to approve its secured claim or requested authorization to credit bid.

Pinnacle had not been present at the July 26, 2012 hearing on the matter because it not been given notice of the Bank's Cross-Motion to amend the Order. Furthermore, at no point prior or subsequent was the Agreement between Pinnacle and the Special Master amended to reflect the changes made to the Order by the Amended Order's additional language.

During the course of its engagement by the Special Master, Pinnacle asserts—and it is undisputed by the parties—that it performed all of its obligations under the Agreement by developing marketing materials and aggressively marketing the Hotel. As a result of its efforts, Pinnacle created a "market" for the Hotel that otherwise might not have existed, thereby increasing the potential value to be received upon sale of the Hotel. On August 6, 2012, the Hotel was sold at auction. One of the bidders generated by Pinnacle, HRS Hotels Group ("HRS Hotels"), bid $4,300,000 at the sale; however, the Bank outbid HRS Hotels by submitting a credit bid in the amount of $4,325,000.

The dispute presently before this Court is whether Pinnacle is entitled to a 3.25% fee from this sale pursuant to the terms of the Order or whether the Bank is entitled to a forty percent (40%) reduction in that fee pursuant to the terms of the Amended Order. Accordingly, Pinnacle filed the present Motion to Authorize Payment of Fee on September 6, 2012 and the Bank filed a Limited Objection to that motion on September 20, 2012. Arguments were heard before this Court on October 2, 2012. For each of the reasons discussed in the subsequent portions of this Decision, Pinnacle's Motion to Authorize Payment of Fee is GRANTED.

II

Standard of Review

In reviewing the validity of claims, fees, and expenses payable during receivership proceedings, the Court is first and foremost bound by the receivership provisions in the Rhode

Island Business Corporation Act. See G.L. 1956 § 7-1.2-1301 et seq. Section 1314 enumerates the grounds for appointing a receiver; however, "those grounds are not exclusive."[5] Peck v. Jonathan Michael Builders, Inc., 2006 WL 3059981, at *6 (R.I. Super. Ct. Oct. 27, 2006) (citing 16 William Meade Feltcher et al., Cyclopedia of the Law of Private Corporations § 7711 (perm. ed., rev. vol. 1998) (hereinafter "Fletcher")). Rather, such statutory enumerations "are usually described as confirming the traditional equity powers of a court, not limiting that power." Id. (citing Cambio v. G-7 Corp., 1998 WL 1473896 (R.I. Super. Ct. Feb. 11, 1998)).

Being that Rhode Island's receivership statute represents "merely a codification of equitable principles," this Court must use such equitable principles to fashion fair and equitable rules of law where state statutes remain silent and binding precedent does not exist. Hill v. M. S. Alper & Son, Inc., 106 R.I. 38, 55, 256 A.2d 10, 19 (1969). Indeed, where state receivership law provides minimal guidance, this Court instead "looks to the Bankruptcy Act and to decisions by the federal courts for guidance." Reynolds v. E & C Associates, 693 A.2d 278, 281 (R.I. 1997) (citing Leonard Levin Co. v. Star Jewelry Co., 54 R.I. 465, 468, 175 A. 651, 653 (1934)).

III

Validity of the Amended Order

In Rhode Island, it has been noted that "[t]he Legislature has granted broad powers of control to enable the court in a receivership proceeding to conserve the interests of all parties involved." Francis v. Buttonwood Realty Co., 765 A.2d 437, 443 (R.I. 2001) (quoting Bogosian v. Woloohojian, 901 F. Supp. 68, 72 (D.R.I.1995), *appeal dismissed, vacated without opinion,* 86 F.3d 1146 (1st Cir. 1996)). In exercising this broad power, "[i]t is the court's obligation to

[5] In this case, the business entity that was placed into receivership is a limited liability company rather than a corporation. Therefore, while the Court took into consideration these factors form the Rhode Island Business Corporation Act, the appointment of the Special Master was made under the Court's equitable powers.

establish 'the terms and conditions of sale as it determines appropriate.'" Id. Thus, "once the Superior Court . . . approves the sale of . . . property and grant[s] the receiver's petition, the receiver [i]s bound by the conditions embodied in the court's order." Id. The complication in the present case is whether the receiver is bound by the terms of this Court's Order or its Amended Order in determining the appropriate compensation for Pinnacle.

Here, the Special Master and Pinnacle seek authorization of the full fee pursuant to the terms of the Order and their Agreement, which would equal 3.25% of the final sale price of the Hotel. However, the Bank objects, claiming that it owes a lesser fee pursuant to the terms of the Amended Order. Additionally, an Agreement exists between the Special Master and Pinnacle which was reviewed and approved by all parties, including the Bank. That Agreement was memorialized as the controlling document in this case by this Court's Order, to which the Agreement was attached as an exhibit.

The Court subsequently entered the Amended Order upon a Cross-Motion by the Bank. The Amended Order changed the terms of Pinnacle's compensation and was not objected to by Pinnacle. The reason for this is that the Bank failed to give notice to Pinnacle of the Cross-Motion to amend the Court's Order. The Bank argues that, despite a lack of notice to Pinnacle of the motion to amend the Order, Pinnacle had constructive and possibly actual notice of the motion through its interactions with the Special Master. While the Bank is correct that Rule 5(a) of the Rhode Island Superior Court Rules of Civil Procedure requires service of pleadings only to parties, it is also true that, as a general rule, a court cannot bind the rights of non-parties who do not receive proper notice. See Metro. Prop. and Cas. Ins. Co. v. Shan Trac, Inc., 324 F.3d 20, 25 (1st Cir. 2003) (noting that *in personam* actions "cannot resolve the rights of non-parties" without notice and that *in rem* actions require "some form of notice"). "The central reason that

one who is not a party to the action . . . cannot be bound by it is that he has not had his day in court." G. & C. Merriam Co. v. Webster Dictionary Co., Inc., 639 F.2d 29, 37 (1st Cir. 1980) (noting that actual knowledge of an injunction is insufficient to bind a party who has not had the opportunity to contest the injunction).

Here, Pinnacle is not a party to the receivership proceedings; however, its rights are bound by its Agreement with the Special Master and, if the Court was to find that the Amended Order controlled in this case, those rights would be impacted. In order for Pinnacle's rights to be altered or affected in that way by an order of this Court, some form of notice is required. See Metro. Prop. and Cas. Ins. Co., 324 F.3d at 25. Furthermore, it is important to note that the terms of the Agreement between Pinnacle and the Special Master were never amended to reflect the changes to the Court's Order reflected in the language added by the Amended Order. Thus, the Bank should have sent notice to Pinnacle of its Cross-Motion to amend the Court's Order because, without such notice to Pinnacle, the Court cannot bind Pinnacle's rights pursuant to its Agreement with the Special Master.

Here, because Pinnacle was not afforded a full and fair opportunity to be heard, the Court is unable to bind its rights as a non-party. See G. & C. Merriam Co., 639 F.2d at 37. Therefore, this Court finds that the Amended Order is invalid. Accordingly, all rights and obligations of the parties are governed by the terms of the Order entered by this Court on May 31, 2012. The Court's finding that the Amended Order is invalid, however, only concludes the first portion of the requisite analysis in the instant case. Further issues remain as to the appropriate method to be used by this Court in determining the amount of compensation actually due to Pinnacle.

IV

Analytical Approaches

Case law dealing with complex receivership issues, such as those presently before this Court, is limited in the State of Rhode Island. Thus, in determining the best method by which to analyze the issue presently before this Court, the Court "looks to the Bankruptcy Act and to decisions by the federal courts for guidance." Reynolds, 693 A.2d at 281 (citing Leonard Levin Co., 54 R.I. at 468, 175 A. at 653). In looking to the Bankruptcy Act, it is apparent that two distinct approaches exist for analyzing the validity of fees for professionals hired to assist with the disposition of assets in a receivership case. See 11 U.S.C. §§ 328, 330.

The approach used in a particular case depends on the type of fee arrangement involved in that case. More specifically, the key distinction between these approaches is whether the fee was pre-approved by the court or brought before the court for approval upon completion of the professional's work. See id. § 328(a) (noting that pre-approved fees may only be modified if the fee's "terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions"); but see id. § 330(a)(1)(A) (noting that professionals whose fees aren't pre-approved are entitled to "reasonable compensation for actual, necessary services rendered"). As stated in the case In re Benassi:

> "A reasonable fee for services rendered . . . would be subsequently determined by the bankruptcy court under § 330 of the Code. In sharp contrast with the old Bankruptcy Act, § 328(a) now authorizes the court to preapprove a wide variety of employment arrangements . . ., including a contingent fee contract. [Section 328(a)] anticipates that the terms of the fee arrangement will be established prior to the rendition of professional services. In re Warrior Drilling & Engineering Co., 18 B.R. 684, 693 (N.D. Ala. 1981). As a safety valve in the event of unpredictable changes, the statute permits the court to award fees at variance with the terms of its previous order when they 'prove to have been improvident in light of developments unanticipatable' at the time the compensation agreement was approved. 11 U.S.C. § 328(a) (1982)." In re Benassi, 72 B.R. 44, 47 (D. Minn. 1987).

Thus, under the approach found in § 328(a) of the Bankruptcy Act, if a court pre-approves professional compensation, it can only engage in subsequent modification of that compensation if the "terms and conditions prove to have been improvidence in light of *developments not capable of being anticipated* at the time of fixing such terms and conditions." 11 U.S.C. § 328(a) (emphasis added). A court may also deny pre-approved compensation to the extent that a party failed to fulfill its contractual obligations; however, that is not the case under the present set of facts. See id. § 328. Alternatively, if a court has not pre-approved professional compensation, it may adjust the compensation based on an evaluation of its reasonableness under the circumstances, including the time spent on the matter, rates charged, and the necessity of the services. See id. § 330(a)(3).

V

Analysis

Having already "look[ed] to the Bankruptcy Act . . . for guidance" in determining the best approaches for analyzing the issue of a professional's compensation, the Court now looks to decisions from federal courts sitting in other jurisdictions for guidance in applying those approaches to the facts of the instant case. Reynolds, 693 A.2d at 281 (citing Leonard Levin Co., 54 R.I. at 468, 175 A. at 653). In so doing, the Court recognizes that such cases are not binding but rather provide persuasive authority that this Court finds useful in crafting its analysis of the present case. See Canario v. Culhane, 1998 WL 2629227, at *1 (R.I. Super. Ct. May 8, 1998) (noting that federal cases are not binding as to issues of Rhode Island law but may be persuasive authority).

As a preliminary matter, the Court notes that this Decision turns entirely on an analysis of the case using the approach found in § 328(a) of the Bankruptcy Act. This approach is most

useful in the present case because, regardless of whether the Order or Amended Order was to control, both were pre-approved. Therefore, the § 328(a) approach that deals exclusively with modification of pre-approved compensation terms is most applicable. However, as previously noted, the Courts finds that the Amended Order is invalid and all subsequent discussion will focus on the original Order.

And while the Court believes that its analysis under the § 328(a) approach is determinative, the Court will also engage in a discussion of the reasonableness approach found in § 330 of the Bankruptcy Act. For reasons further discussed in the following sections of this Decision, the Court holds that, even under the reasonableness approach under § 330, the outcome of the present case remains the same and Pinnacle is entitled to its full fee equal to 3.25% of the final sale price of the Hotel.

A

First Approach: Pre-Approved Fees

When a professional's compensation terms are pre-approved by a court, § 328(a) of the Bankruptcy Act allows a court to modify pre-approved compensation terms only when events have occurred that were not capable of being anticipated at the time the compensation terms were approved. 11 U.S.C. § 328(a); see In re HNRC Dissolution Co., 340 B.R. 818, 826 (E.D. Ky. 2006). The facts of the case presently before the Court are similar to those in In re HNRC Dissolution Co., which the Court finds to be persuasive authority in shaping the outcome of the instant issues. In that bankruptcy case, the debtors filed an application to obtain a specific financial advisor and investment banker. See In re HNRC Dissolution Co., 340 B.R. at 820-21. The bankruptcy court entered an order approving the application "pursuant to the terms of an engagement letter." Id. at 821. Subsequently, the debtors applied to amend the order to alter the

compensation structure contained therein. Id. The revised fee arrangement was approved by the court in an order that "superceded all prior orders in regard to compensation." Id. Following the sale of assets, a dispute arose over the sale transaction fee due. In particular, parties disputed whether the credit bid portion of the sale price was to be included in the calculation of the fee and whether the court had authority to modify the fee retroactively. Id. at 822.

The court held that it could not alter compensation approved pursuant to § 328 of the Bankruptcy Act unless the "terms and conditions prove to have been improvidence in light of *developments not capable of being anticipated* at the time of fixing such terms and conditions." Id. (quoting 11 U.S.C. § 328(a)) (internal quotations omitted) (emphasis added). The court found that "it was contemplated that the value of the credit bid as well as the assumption of liabilities would be taken into account in determining [the] fee." Id. at 822. In doing so, the court also "rejected the argument that the [c]redit [b]id was valueless."[6] Id.

Borrowing the analysis found in In re HNRC Dissolution Co., this Court must first determine whether any developments have occurred since the entry of the Order that would render the terms of that Order improvident. See In re HNRC Dissolution Co., 340 B.R. at 821 (citing 11 U.S.C. § 328(a)). Then, the Court must determine whether any such developments were unanticipated or, in the language of § 328(a) of the Bankruptcy Act, "not capable of being anticipated at the time" the Order was entered. Id. Using this analytical approach, however, the Court finds that, much like In re HNRC Dissolution Co., the terms and conditions of its original

[6] The Bank has not asserted any argument that the credit bid in the present case was valueless, thus entitling Pinnacle to no fee at all. However, the Court believes such an argument would have been without merit because, as discussed in In re HNRC Dissolution Co., the Bankruptcy Act "treats credit bids as a method of payment—the same as if the secured creditor has paid cash and then immediately reclaimed that cash in payment of the secured debt." 340 B.R. at 824-25 (citing 11 U.S.C. § 363(k)).

Order have not been proved improvident "in light of developments not capable of being anticipated at the time of fixing such terms and conditions." See id.

There are two developments in this case that could potentially be viewed as unanticipated, thereby allowing the Court to modify the terms of its Order. First, allowing a credit bid which had not been contemplated by the terms of the Order represents one such development. The Bank has stated that it did not include language regarding such a credit bid in the initial Order for fear that it would chill bidding by other parties. This argument is not persuasive because, "[a]lthough some may argue that credit bidding chills cash bidding, that argument underwhelms; credit bidding chills cash bidding no more than a deep-pocketed cash bidder would chill less-well-capitalized cash bidders." In re Philadelphia Newspapers, LLC, 599 F.3d 298, 321 (3d Cir. 2010) (Ambra, J., dissenting), *as amended* (May 7, 2010).

However, despite the fact that the Bank's credit bid is not expressly allowed by the terms of the Order and regardless of the reasons that such language was not included in the Order, the Court finds that a successful credit bid by the Bank does not constitute an event that was "not capable of being anticipated at the time" the Order was entered. 11 U.S.C. § 328(a). This is because credit bids are common practice and, therefore, inherently capable of being anticipated by all parties. See 11 U.S.C. § 363(k). Indeed, under § 363(k) of the Bankruptcy Act, a creditor has a right to credit bid on assets "unless the court for cause orders otherwise." Id.; see RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S.Ct. 2065, 2073 (2012) (noting that "debtors may not sell their property free of liens. . . without allowing lienholders to credit-bid"). Because the Court has not "for cause order[ed] otherwise," the Bank's ability to credit bid does not constitute an unanticipated development that would allow the Court to modify the terms of Pinnacle's compensation as provided for in the Order. See 11 U.S.C. § 363(k).

Next, the Bank also states that it had believed a stalking horse bid would be used in connection with the sale to solicit other parties to bid; however, this never occurred because the Special Master failed to provide the purchase and sales agreement for the property in a timely manner. The Bank could argue that lack of a stalking horse bidder constitutes an unanticipated development that would allow the Court to reduce the amount of compensation to which Pinnacle is entitled pursuant to the terms of the Order; however, the Court finds this argument unpersuasive. While the Court agrees that this would constitute a "development not capable of being anticipated at the time" the Order was entered, such an unanticipated development has not rendered the terms of the Order "improvident." 11 U.S.C. § 328(a). The reason for this is that, as previously discussed, it is undisputed that Pinnacle aggressively marketed the Hotel, thereby creating a substantial "market" for the Hotel that would not have otherwise existed. Therefore, the Court should remain bound by the terms of its Order, as such terms have not been proved to be improvident in light of any unanticipated development. See 11 U.S.C. § 328(a); see also In re Schubert, 142 B.R. at 343.

For the sake of discussion, it is important to note that the Court's result under this § 328(a) approach would be the same even if the Court had determined that the Amended Order controlled. The Court would be entitled to modify the terms of that Amended Order because a development did occur as to the entry of the Amended Order that was "not capable of being anticipated" by Pinnacle. 11 U.S.C. § 328(a). That unanticipated development was a lack of proper notice to Pinnacle regarding the Bank's Cross-Motion which resulted in the entry of the Amended Order, as discussed in the preceding sections of this Decision. Thus, had the Court not deemed such lack of notice to have been fatal to the Amended Order, the Court could have taken into account that lack of notice under a § 328(a) analysis and approved Pinnacle's full fee

notwithstanding the terms of the Amended Order. However, no similar unanticipated development exists that would require the Court to reduce the amount of compensation anticipated by Pinnacle. Therefore, this Court holds the Special Master is authorized to pay Pinnacle its fee of 3.25% of the final sale price of the Hotel without any reduction in the amount of that fee.

The Bank argues that the invalidity of the Amended Order creates an important public policy issue because the Bank relied on this Court's Amended Order in formulating its credit bid. However, as previously discussed, the fatal flaw in regards to the Amended Order is the failure of the Bank to properly notice Pinnacle, thereby affording Pinnacle a full and fair opportunity to be heard. The Bank further argues that, even if the Amended Order is invalid, the language of the original Order makes Pinnacle's compensation "subject to Court approval" and, therefore, Pinnacle could easily have anticipated not receiving its full fee. The Bank is correct in this regard; however, the Court believes that Pinnacle should not bear the burden of a reduced fee following the satisfactory completion of its work.

By contrast, such a reduction was found to be warranted under the facts as they existed in In re Schubert. See 142 B.R. 337, 343 (S.D.N.Y. 1992). In that case, the court allowed a reduction in compensation for a broker upon finding that the broker played a minimal role in the sale. Id. at 343. Because the case involved pre-approved compensation terms, the court looked to the analytical approach required by § 328(a), finding that the broker's "minimal role was a development not capable of being anticipated . . . when the Bankruptcy Court issued the retention order" and that such a development made the compensation terms "improvident in light of [the broker's] minimal role." Id. In the instant case, however, it is undisputed that Pinnacle aggressively marketed the Hotel, thereby creating a substantial "market" for the Hotel that would

not have otherwise existed. Therefore, the Court should remain bound by the terms of its Order, as such terms have not been proved to be improvident in light of any unanticipated development. See 11 U.S.C. § 328(a); see also In re Schubert, 142 B.R. at 343. This does not preclude the Bank from filing an objection the Special Master's request for compensation; however, such an objection is not presently before this Court.

Furthermore, even if the terms of Pinnacle's compensation were deemed improvident based on the previously discussed developments, the Court would still not be required to reduce Pinnacle's fee. See In re HNRC Dissolution Co., 340 B.R. at 826 ("Even where such unforeseeable circumstances are present, the . . . Court in any event is not *required* to deviate . . . [because] Section 328 uses the word 'may' to express that deviation in the fact of circumstances not capable of anticipation is permissive but not mandatory in any case.") (emphasis in original). Thus, even if the Court had found such unanticipated circumstances to exist in the present case, its outcome of this Decision would remain the same based on the equitable considerations discussed further in Section III.C of this Decision.

For each of these reasons, Pinnacle is entitled to receive its full fee equal to 3.25% of the final sale price. Because this Court agrees with the analysis found in In re HNRC Dissolution Co. that a credit bid has value that ought to be taken into account in determining the amount of Pinnacle's fee, see 340 B.R. at 824-25, the fee due to Pinnacle is $140,562.50—an amount which represents 3.25% of the Bank's successful $4,325,000 credit bid. As previously stated, this analysis of the approach regarding modification of pre-approved compensation terms under § 328(a) of the Bankruptcy Act is sufficient in determining the outcome of the present case; however, the Court will now provide a discussion of the alternate approach under § 330 of the Bankruptcy Act.

B

Second Approach: Fees Approved Upon Completion of Work[7]

Unlike the analysis used by the court in In re HNRC Dissolution Co., the standard measure of a fee's validity is typically based on an analysis of the fee's reasonableness. See In re HNRC Dissolution Co., 349 B.R. at 821 ("The [court's] pre-approval takes the agreed upon compensation out of the realm of the usual 'reasonableness' review under section 330 [of the bankruptcy code]."). The Bankruptcy Act allows professional persons hired by the Trustee to be paid "reasonable compensation for actual, necessary services rendered." 11 U.S.C. § 330(a)(1)(A). In determining what constitutes reasonable compensation,

> "the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> > "(A) the time spent on such services;
> > "(B) the rates charged for such services;
> > "(C) whether the services were necessary to the administration of or beneficial at the time at which the service was rendered toward the completion of, a case . . . ;
> > "(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
> > "(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
> > "(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." Id. § 330(a)(3).

Although its decision turned mainly on a § 328(a) analysis, the U.S. District Court for the Southern District of New York upheld the Bankruptcy Court's modification of a compensation scheme in In re Schubert based upon the finding that one broker "played a significant role" in the

[7] As previously stated, this Court believes that it need go no further than an analysis under § 328(a) of the Bankruptcy Act; however, a discussion of the reasonableness approach under § 330 of the Bankruptcy Act is provided to demonstrate the consistency of this Court's opinion regardless the approach under which the present facts are analyzed.

sale while the other "played a minimal, if any, role." 143 B.R. at 346. These factors are relevant not only to the § 328(a) analysis but also to the reasonableness analysis provided for under § 330 of the Bankruptcy Act. See 11 U.S.C. § 330(a)(3)(A)-(F) (noting the importance of the time spent by a professional and the customary compensation for similar work to a reasonableness determination). Under the circumstances as they existed in In re Schubert, the brokers would have received unreasonable fees if the court had not made such a modification based on reasonableness considerations. See 142 B.R. at 346.

This reasonable analysis under § 330 of the Bankruptcy Act is the baseline method of analyzing the validity of a professional's compensation terms. For example, even § 328(a), which applies exclusively to pre-approved compensation terms, provides that professionals may be employed on "any reasonable terms and conditions of employment," thereby couching all analysis under that statute in terms of basic reasonableness principles. 11 U.S.C. § 328(a); see In re HNRC Dissolution Co., 340 B.R. at 821; see also In re Schubert, 143 B.R. at 343. Here, both the Order and Amended Order provide for compensation "subject to Court approval." Thus, the Court has leeway in extending or reducing those terms based on an evaluation of the compensation's reasonableness in light of the surrounding circumstances.

Pinnacle was hired by the Special Master to assist in the sale of the Hotel by, among other things, aggressively marketing the Hotel to potential buyers. The marketing expenses were to be paid by Pinnacle and, in exchange, Pinnacle would receive a fee upon the successful sale of the Hotel. The fact that it was ultimately the Bank's credit bid that came in as the highest bid at the sale is irrelevant to our present inquiry. That is because, in performing its duties under this Court's Order and its Agreement with the Special Master, the Court finds that Pinnacle created a substantial "market" for the Hotel that otherwise would not have existed. Therefore, while the

Bank's credit bid may have been the highest, it is likely that each of the bids presented were significantly higher than they would have been without Pinnacle's aggressive marketing efforts.

Thus, similar to the facts of In re Schubert, Pinnacle's "significant role" in the sale of the Hotel warrants a fee commensurate with its level of involvement. See 143 B.R. at 346. Having determined that the circumstances warrant Pinnacle receiving a fee, the Court must then look to the factors in § 330 of the Bankruptcy Act to determine whether Pinnacle's compensation terms as provided for by the Order are reasonable under the circumstances. First, Pinnacle spent a significant amount of time on marketing the Hotel. See 11 U.S.C. § 330(a)(3)(A). Next, there is no dispute that Pinnacle's "services were necessary to the administration of [the sale and] beneficial at the time at which the service was rendered." Id. § 330(a)(3)(C). Finally, the Court finds that the 3.25% fee provided for under the Court's Order is reasonable given the final sale price of the Hotel and "the customary compensation charged by comparably skilled practitioners in [other] cases." Id. § 330(a)(3)(F).

In addition to the foregoing analysis of the reasonable factors found in § 330 of the Bankruptcy Act, the Court also considers the circumstances surrounding its entry of the Order. In this case, the reasonableness of the compensation terms found in the Order is bolstered by the fact that those terms were reviewed by all parties, including the Bank, in the engagement letter between the Special Master and Pinnacle prior to the Court's entry of the Order. For this reason, as well as the Court's review of the reasonableness factors in § 330, the Court holds that the terms of Pinnacle's compensation are reasonable, as provided for by the Order. Therefore, under this analytical approach, Pinnacle is entitled to its full fee equal to 3.25% of the final sale price of the Hotel—$140,562.50.

VI

Equitable Powers of the Court

Notwithstanding the Court's analysis in the foregoing sections of this Decision, the Court will now discuss its ability to fashion equitable remedies outside the scope of statutory receivership and bankruptcy law. As previously mentioned, "[t]he Legislature has granted broad powers of control to enable the court in a receivership proceeding to conserve the interests of all parties involved." Francis, 765 A.2d at 443. In furtherance of this responsibility and due to the fact the receivership statutes in Rhode Island are "merely a codification of equitable principles," this Court recognizes its ability to fashion remedies that are fair and equitable given the circumstances of a particular case. Hill, 106 R.I. at 55, 256 A.2d at 19.

The Bank in this case submitted a successful credit bid on the Hotel in the amount of $4,325,000 and, based on the terms of the Amended Order, seeks a forty percent (40%) reduction in the brokerage fee that it is required to pay to Pinnacle. However, as discussed in the Court's foregoing analysis, the Court holds that Pinnacle is entitled to the full amount of its fee notwithstanding that language of the Amended Order. In so holding, the Court recognizes the potential hardship placed upon the Bank if it is obligated to pay a brokerage fee in an amount greater than it anticipated when crafting its credit bid for the Hotel.

HRS Hotels submitted the second-highest bid for the Hotel at the August 6, 2012 auction. That bid was in the amount of $4,300,000. It is the Court's understanding, based upon the representations of the Special Master at the hearing, that HRS Hotels is prepared to move forward with the sale in the event that the credit bid submitted by the Bank fails in some way. Therefore, in the event that the Bank finds payment of Pinnacle's full fee to be cost-prohibitive,

the Court is willing to craft an equitable solution by setting aside the sale of the Hotel to the Bank. This would allow the sale to move forward with HRS Hotels.

The Court recognizes that this would result in a loss of $25,000 in the sale price of the Hotel. This loss may seem, at first blush, to go against the Special Master's goal in the instant case by not permitting him to receive the largest amount possible for the sale of the Hotel. However, countervailing public policy considerations require that this Court consider the plight of brokers and other professionals whose services will certainly be required in future receivership cases. Those parties ought to be able to rely on the court's approval of their fee arrangements without concern that they will face the loss of their fee following the satisfactory completion of the tasks for which they are hired. Despite this public policy concern, the Court recognizes that all fees in this case have been specifically stated to be "subject to Court approval."

Therefore, such an equitable remedy is not mandated; rather, the Court merely provides this as an option to which the parties may choose to agree. In the event that the parties are unable to agree to such an equitable remedy, the Court's Decision regarding the amount of Pinnacle's fee will remain in force and Pinnacle will be entitled to the greater of either 3.25% of the final sale price or $100,000, pursuant to the terms of the Order issued by this Court on May 31, 2012. Based on the amount of the Bank's successful credit bid, Pinnacle is entitled to 3.25% of the final sale price, which amounts to $140,562.50.

VII

Conclusion

For each of the reasons discussed in this Decision, this Court holds that Pinnacle is entitled to receive its full fee of 3.25% of the final sale price of the Hotel. The Special Master is,

therefore, authorized to pay that fee. However, recognizing the potential equitable concerns involved in requiring the Bank to pay a fee in that amount when it was not contemplated in the preparation of its credit bid, the Court will allow the Bank withdraw from the sale. Such a withdrawal may only be made upon agreement of all of the parties. In the event of such a withdrawal, it is the Court's understanding—based on representations made by the Special Master—that HRS Hotels, the second-highest bidder at the sale, is prepared to proceed with its offer for $4,300,000. The Court, therefore, authorizes the parties to move forward with the sale to HRS Hotels in the event that the Bank is relieved from its obligations as the highest bidder at the sale.